of administration to her mother's estate. In fact her whole case is that there is no estate. By opposing the grant of letters of administration to the petitioner, she is taking steps to protect her own interest in the business, and it appears to me that clause 4 completely covers the eventuality which has arisen. This submission therefore fails.

As regards the appearance, it is suggested that the appearance entered was not in the form prescribed by Rule 13 (volume I, page 54 of Allen's Rules). There are several answers to this objection. First of all, the appearance was entered in pursuance of Rule 65 of the non-contentious rules. Rule 13 applies to contentious business only, and no form is prescribed for an appearance under Rule 65. Secondly, it is not disputed that the petitioner's Solicitors asked for particulars of the caveator's interest, and were given the necessary information. They then set down the petition for hearing. If therefore there was any substance in the objection, it was waived. Thirdly, the point was not raised in the Court below, and is devoid of any merits whatever.

To deal with the substantive grounds of appeal, there seems to be no answer to the argument that under Rule 65, when once an appearance has been entered, the matter became contentious. It is true that Rules made under the Courts Enactment cannot supersede the provisions of the Probate and Administration Enactment, if they are inconsistent therewith, and it was held by the learned trial Judge that section 77 of the Enactment enabled the Court to make a grant of letters of administration even after a caveat had been filed, provided that the caveator had received notice. But the section does not say when contentious business commences. One must look to Rule 65 for that, and having ascertained when it commences, a point on which the Enactment is silent, section 85 comes into play and provides the procedure to be followed. From this latter section it is quite clear that no grant of letters of administration can be made until the contest has been decided. If section 77 has the meaning given to it by the learned trial Judge, the result would be that the Court being petitioned to grant letters of administration, and knowing that there was an objection, could nevertheless proceed to make the grant without having before it any evidence as to what the objection was.

I also think that the jurisdiction of the Court only arises under section 67 of the Enactment when there is some estate in the Federated Malay States to be administered. On the face of the petition, the only estate consists of certain interests, which the recitals in the powers of attorney (which were put in by the petitioner) show to have been transferred by deed of gift prior to the deceased's death. The petitioner as a son of the deceased and beneficially entitled to share in her property, if any, has sufficient interest to bring a suit to set aside the deeds of gift, if he is so advised. But until he has brought such a suit to a successful conclusion, there is no estate to be administered. The Court will certainly not assist the petitioner by making a prima facie decision that there is an estate to be administered, when that is an issue which should properly be decided in other proceedings. Such a ruling would appear to be in accordance with a long line of Indian authorities (see *Sarup Dassin v. Hari Charan Dass*[2]; *Prasonno v. Ram Chandra Sigha*[3]; and *Man Singh v. Santi*[4]).

In my opinion therefore, and on the facts before the learned trial Judge, there was no jurisdiction to make a grant of letters of administration in favour of the petitioner. The appeal must be allowed and the grant set aside. The appellant will be entitled to the costs of the appeal and of the hearing below. The costs of the petition itself will be costs in the cause. The deposit should be paid out to the appellant or her Solicitor. I see no ground for granting a certificate for two counsel, and such application is refused.

McElwaine C.J. S.S.: I agree.

Aitken Ag. J.A.: I agree.

Appeal Allowed.
Order Accordingly.

HAJI HUSSIN BIN HAJI MATSOM v. MAHERAN BINTI HAJI HOHAMED TAHIR.

[App. Civil Jurisdiction (Horne, J.) August 30, 1941]

Customary Tenure Enactment (Cap. 215), Section 4 — Distribution Enactment (Cap. 8), Section 179 — Decision by Collector that land is not occupied subject to custom — Subsequent distribution of acquired property of deceased in accordance with personal law of deceased — Distribution according to Adat.

The deceased, Mintan binti Haji Mohamed Tahir, died in 1932 leaving a husband (the appellant), a daughter who died seven months later and a sister of the full blood, Maheran (the respondent). The deceased

at the time of her death was the registered proprietor of four small plots of rubber in undivided shares with Maheran and one plot in sole ownership. Maheran had been in possession of the lands since her sister's death. The appellant did nothing until 1940 when he applied to the Collector of Land Revenue for distribution of the estate of the deceased, claiming ¾ths as widower and ¼th as heir to his deceased daughter. The respondent objected and claimed the whole under the **Adat.** The Collector stopped the proceedings under Cap. 8 and proceeded to hold an enquiry under Section 4 of the Customary Tenure Enactment (Cap. 215). He found that the land was not customary land and that it was acquired property. He then continued the proceeding under Section 179 of Cap. 8 and ordered that the land be distributed according to the **Adat.** The appellant appealed.

Held, (1) that despite the decision that the land was not customary land it was open to the Collector in proceedings under S. 179 of Cap. 8 to transmit the acquired property of the deceased in accordance with the personal law of the deceased, which was Mohammedan Law as varied by the **Adat.**

(2) that having come to a decision such as the present which under the **Adat** converts acquired property into ancestral property the Collector is bound to hold an enquiry under Section 4 of the Customary Tenure Enactment and endorse the Entry in and Exract from the Mukim Register, "Customary Land".

Cases referred to :—

(1) *Sali binti Haji Salleh v. Achek bin Enot* 10 M.L.J. 14.

(2) *Kutai bin Haji Lateh v. Taensah binti Haji Enoh* 3 M.L.J. 251.

(3) *In re Haji Mansur* 9 M.L.J. 110.

R. H. V. Rintoul for the appellant.

Respondent in person.

The facts and arguments sufficiently appear from the judgment.

Horne, J.—Mintan binti Haji Mohamed Tahir died in 1932 leaving a husband (the appellant), a daughter who died seven months later and a sister of the full blood, Maheran (the respondent). Mintan at the time of her death was the registered proprietor of four small plots of rubber in undivided shares with Maheran and one plot in sole ownership. Maheran has been in possession of the lands since her sister's death. The appellant did nothing until 1940 when he applied to the Collector of Land Revenue for distribution of the estate of Mintan, claiming 3/4ths as widower and 1/4th as heir to his deceased daughter. The respondent objected and claimed the whole under the adat.

The Collector stopped the proceedings under Cap. 8 and, misunderstanding in some way my judgment in *Sali binti Haji Salleh v. Achek bin Enot*[1] proceeded to hold an enquiry under section 4 of Cap. 215. In *Sali binti Haji Salleh v. Achek bin Enot* I pointed out that the only land which can be described as "Customary land" is land the title to which has been endorsed "Customary land" and that the expression "Customary land" meant land which was ancestral property (harta pesaka) as opposed to land which was acquired property (harta charian).

Mr. Rintoul now contends that as there has been an enquiry under section 4 of Cap. 215 in which there has been a decision that the land is not customary land, the Collector cannot in continuing the proceeding under section 179 of Cap. 8 order that the land be distributed according to any adat rule relating to property. This is an attempt to restore the view which was current from 1934 [see *Kutai bin Haji Lateh v Taensah binti Haji Enoh*[2]] until Cussen J. took a contrary view in the case of *In re Haji Mansur*[3]. Mr. Rintoul submits that as the decision under section 4 of Cap. 215 is conclusive proof that the land *is not* customary land and as in face of that the Collector now in effect declares that it *is* customary land there are now in existence two existing and contrary decisions. But this attempt to impale the Collector or myself upon a dilemma fails when the expression "occupied subject to custom" is used and understood in relation to the subject matter. A decision under section 4 of Cap. 215 that the land is not "occupied subject to custom" means that the land is not, at the time the decision is given, ancestral property. Such a decision is therefore "conclusive proof" that the land is "acquired". It is open to the Collector in proceedings under section 179 of Cap. 8 to transmit the acquired property of the deceased in accordance with the personal law of the deceased. That law is Mohammedan law as varied by local custom. Under Cap. 8 the Collector is concerned with the law applicable to a person. Under Cap. 215 section 4 he is concerned with the character of a certain kind of property viz. land. But under the custom it must be remembered that there is no difference between land and other property. All is property and is either acquired property (harta charian etc.) or ancestral property (harta pesaka). There is, therefore, no conflict between the decision under section 4 of Cap. 215 and the decision under section 179 of Cap. 8 now under appeal.

It is, however, now sought to set up in this appeal another reason for a transmission according to Shara viz. that where a person has acquired the property by a transmission under Mohammedan law it is no longer acquired property. But as there is

no endorsement "customary" on the title — that the land is or has become "ancestral" — the land can, in the Malay conception be nothing else but "acquired property.

If the Collector's order stands the property in question is something different to what it was when the enquiry under section 4 of Cap. 215 was held for the Collector's order transmitting the land to the person entitled under the adat changes the land from being acquired property to ancestral property. It would now be competent to endorse the title "Customary Land".

That was what I suggested in the concluding words of the judgment in *Sali binti Haji Salleh v. Achek bin Enot*[1] which are: "The matter now being in the hands of the Collector he is entitled under section 4 (1) of Cap. 215 to endorse the title 'Customary' ". There is nothing in the judgment in Civil Appeal No. 3/1940 which was delivered earlier to conflict with this judgment. There was merely an order to re-hear in that case and the reference to section 4 is unnecessary to the decision.

The Customary Tenure Enactment (Cap. 215), as Cussen J. points out in *In re Haji Mansur*[3], partially replaces the unwritten customary law. It is the duty of the Collector to give effect to that Enactment. That is the reason of the above concluding words. One of the objects of Cap. 215 is to prevent property in land going out of and away from the custom. Consequently I consider that where the Collector has made a decision such as the present which under that adat converts acquired property into ancestral property he is bound to hold the enquiry under section 4 and endorse the Entry in and Extract from the Mukim Register "Customary Land". A contrary view would result in persons using the adat when it suits them to establish claims by succession and then remain free of that part of the custom which is embodied in the Enactment: a result which can never have been intended.

The appeal is dismissed with costs and the Collector's order will stand.

Appeal Dismissed.

ICHAH BINTI BADOR v. COLLECTOR OF LAND REVENUE, KUALA PILAH.

[App. Civil Jurisdiction (Horne, J.) August 8, 1941]

Land Code Ss. 44 and 106 — Partition of Land — Refusal of Collector of Land Revenue to arrange partition or sale.

In this case co-owners applied to the Collector of Land Revenue, Kuala Pilah, for partition of the land, and in effect the Collector refused to proceed under Section 106 of the Land Code.

Held, the Collector of Land Revenue has no authority or jurisdiction to take into consideration unregistered interests and that he has no power to refuse an application altogether.

C. M. Pillai for the appellant.

M. C. Hay for the respondent.

Horne, J.—In this case the appellant and her sister were the registered owners in undivided shares of a piece of land in the Mukim Register which I understand is not endorsed Customary Land. The co-owners applied to the Collector of Land Revenue, Kuala Pilah, on 3rd July, 1940, submitting a sketch plan of the proposed and agreed subdivision, and in effect the Collector refused to proceed under section 106.

By section 44 of the Land Code any co-proprietor may claim to have a partition of the land if the land be not subject to a charge or lease; and by subsection (iii) of section 44 jurisdiction in respect of partition of land in the Mukim Register is given to the Collector. Section 106 provides that the Collector may, after such enquiry as he may deem necessary, cause the land to be divided into as many parts as there may appear shares in the Mukim Register, or may direct a sale. Consequently there is no power to refuse an application altogether. The Collector has to arrange the partition or order a sale. He has no authority or jurisdiction to take into consideration unregistered interests and to refuse to act. If the circumstances justify him so doing, he might adjourn the matter, but he ought not to take into account unregistered claims or claims which are incapable of registration. Partition is clearly a matter between registered proprietors; and the words "after such enquiry as he may deem necessary" do not empower the Collector to take into account unregistered interests because he can only partition the land into as many parts as there may appear shares in the register.

I therefore order that the Collector do proceed with the application of the appellant dated 3rd July, 1940, in accordance with section 106 of the Land Code.

Order accordingly.